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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1892

CASPAR W. WEINBERGER, Secretary of Health, Education and Welfare,

Appellant,

—v—

STEPHEN CHARLES WIESENFELD, Individually and on behalf of all persons similarly situated,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL RIGHTS

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BRIEF FOR AMICUS CURIAE CENTER FOR CONSTITUTIONAL RIGHTS

STATEMENT OF INTEREST

The Center For Constitutional Rights is a non-profit, tax exempt legal and educational corporation dedicated to ad-

vancing and protecting the rights and liberties guaranteed by the Bill of Rights to the United States Constitution. Born of the efforts of lawyers in the Civil Rights Movement in the South, the Center has since that time included in its legal efforts other groups which have been the subject of systematic and pervasive discrimination.

Since 1969 the Center has devoted substantial energy to the struggle of women to effectuate their constitutional rights to equal protection of the laws and has taken leadership in the legal movement for equal rights. Amicus is thus concerned with the maintenance and expansion of constitutional protection afforded women.

ARGUMENT

Introduction

The instant case is of historic

importance to the development of constitutional protection of equal rights for women. After this Court's landmark decisions in Reed v. Reed, 404 U.S. 71 (1971) and Frontiero v. Richardson, 411 U.S. 677 (1973), which struck down sex-based laws on the basis of a close examination of the stereotypes embodied in those laws, this Court last term suggested a return to traditional sex-stereotyped assumptions when it upheld, in Kahn v. Shevin, 416 U.S. 391 (1974), a sex-based statute on the ground that it remedied past discrimination encountered by women. Now, on the basis of Kahn, appellant contends that Section 402(g), 42 U.S.C., is unconstitutional, despite its sex-stereotyped origin and impact, on the theory that the statute is also remedial.

Amicus contends that this Court must soundly reject any extension of Kahn and

give clear direction to the lower courts to scrutinize remedial rationales closely.

I. SECTION 402(g) EMBODIES AND PERPETUATES HISTORIC SEX-BASED DISCRIMINATION IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Acceptance of appellant's rationale of remedial treatment in the instant case would signal a reversion to the sex-stereotyped paternalism repudiated in Reed and Frontiero.

Historically, special treatment of women based on either biological or economic inferiority has always meant unequal treatment and has "heaped on" additional disadvantages. Frontiero v. Richardson, 411 U.S. at 689, n. 22. Early protective labor laws, which were routinely approved by male legislators and judges as beneficial to women, operated in fact, to exclude women from the labor market or to justify lower pay scales for

equal work. Brown, et al., "The Equal Rights Amendment: A Constitutional Basis for Equal Rights of Women," 80 Yale L.J. 871, 927 (1971); Babcock, et al., Sex Discrimination and the Law: Causes and Remedies, (1975), p. 251-3. Based on gross stereotypes of women's proper role as mother and childrearer, see e.g. Muller v. Oregon, 208 U.S. 412 (1908), these laws perpetuated a heritage of "romantic paternalism which, in practical effect, put women not on a pedestal but in a cage", Frontiero v. Richardson, supra, at 679, and ensured women's second-class status in employment and society. See Johnston and Knapp, "Sex Discrimination by Law: A Study in Judicial Perspective," 46 N.Y.U. L.Rev. 675 (1971). Lest this Court continue the "romantic paternalism" of the past, the remedial rationale asserted herein must be rejected.

As a first matter, appellant's contention that §402(g) is designed to ameliorate women's inferior economic position is highly questionable. Review of the statute's legislative history fails to demonstrate any such remedial intent. See Brief for the Appellee, pp. 16-17, Brief for the Appellant, pp. 12-14. Congress was concerned with the plight of children who survived deceased workers and assumed that only women were dependent and would stay at home to rear them. The purpose of the statute was not to remedy sex discrimination but to assist worker's beneficiaries. Appellant's attempt in this case to tack a new "remedial" rationale onto an old statute, which originated in and reinforces the traditional sex-based assumptions of the past, is cause for extreme suspicion. Compare Cleveland Board of Education v. LaFleur, 414 U.S. 632 n.9

(1974).

Indeed, the assumption underlying §402(g), that woman is home-centered and man is work-centered, are precisely those repudiated by this Court in Reed and Frontiero. §402(g) ranks all women as secondary breadwinners, whose employment in the labor market is less valuable than the employment of men, and assigns them the role of childrearer. It ranks all men as primary breadwinners and denies them the opportunity to personally rear their children if and when their children have no other parent to care for them.

The impact of this provision is the further perpetuation of sex-based discrimination. The statute operates to restrict marital choices as to work and the care of children by assigning and encouraging the performance of those functions on a traditional sex-stereotyped basis.

By denying women the possibility of providing for their families in the event of their death, it operates as a continuing disincentive to women to work and strengthens the assumption that only men's work is valuable and important. Conversely, the statute embodies a continuing disincentive to men to care for their children both while their spouse is alive and in event of her death. Thus the statute reinforces, not remedies, women's second-class status in employment.

The kind of denigration of women's labor outside the home, represented by §402(g), severely hinders the breakdown of sex-based social rules which is central to women's economic advancement and full equality. Like protective labor laws, which reinforced and rationalized exclusion of women from the job market, the statute at issue herein perpetuates the "sharp

line between the sexes" which this Court declared must be firmly put to rest. Frontiero v. Richardson, supra.

Finally, appellant's effort to analogize this case to Kahn v. Shevin is misplaced. While amicus would contend that this Court's decision in Kahn embodied the sex-stereotyped assumptions of Muller,*/ Kahn involved a state taxirg statute to which this Court normally accords "large leeway". Id. at 392. Moreover, the perpetuation of a dependency stereotype which has the impact of further disadvantaging women in employment and restricting marital choices was not at issue in Kahn. The tax statute involved there gave women a one-time gift which had no effect on role

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*/ The citation of Muller in Kahn, 416 U.S. at 392, n. 10, reveals the close linkage between the remedial rationales of the present and the protective cloaks of the past.

allocations within the family. Like Frontiero, the statute here incorporates assumptions concerning lack of value given to women's work outside the home and relies on the effects of past sex discrimination "as a justification for heaping on additional economic disadvantages." Frontiero v. Richardson, 411 U.S. at 689, n. 22 cited in Kahn v. Shevin, 416 U.S. at 392, n. 8.*/

Consistent with this Courts recognition in Frontiero of the double-edged discrimination in special treatment for women, the sex-line of §402(g) must be rejected.

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*/ However, the discrimination herein is even more invidious than in Frontiero since the sex-based barrier is unsurmountable. It would be anomalous indeed if sex-based preferences justified on the basis of administrative convenience were to receive stricter treatment by this Court than flat sex-based exclusions.

II. REMEDIAL RATIONALIZATIONS OF SEX-BASED DISCRIMINATIONS MERIT CLOSE JUDICIAL SCRUTINY.

This Court's refusal to tolerate sex-stereotyped assumptions and effects under the "fair and substantial relationship" test, applied in Reed and Frontiero, dictates affirmance of the district Court's judgment. It is accordingly technically unnecessary for the Court to reach the question of whether to accord women "suspect" status under the Equal Protection Clause. Nonetheless, amicus submits that this case demonstrates the importance of this Court's applying the traditional vehicle of "suspect classification" to sex discriminatory laws.

The opinion of the district court illustrates that this Court's articulation of an intermediate test applicable to sex-based classifications in Reed v. Reed does not provide clear enough instruction to

the lower courts to scrutinize closely the sex-stereotypical assumptions and impact of sex-based laws. Although the district court erroneously rejected the argument that Reed and Frontiero establish a new, strengthened equal protection test, it did acknowledge that it was obliged under Reed to "analyze statutory classifications based upon sex in more pragmatic terms of this everyday modern world rather than in the stereotyped generalizations of the Victorian Age." Wiesenfeld v. Secretary of Health, Education & Welfare, 367 F.Supp. 981, 988 (D.N.J., 1973). Nevertheless, after detailing the specific discriminatory effects of §402(g), Id. 989, the Court loosely accepted the remedial rationale and sustained the statute under Reed on the stereotypical assumption that "women and families who have lost the 'male head of household'" are categoric-

ally more needy.*/ Id. at 990. The district court believed that it had to treat the remedial rationale as "suspect" and apply strict scrutiny in order to give determinative effect to the fact that beneficience here is but a guise for the perpetuation of discriminatory disadvantages for women.

While the district court can be corrected for misapplication of the Reed test, amicus believes that more decisive action by this Court is called for, particularly in light of the intervening decision in Kahn v. Shevin,**/ supra. Given the tenacity

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*/ See Brief for the Appellees, p. 18, n. 12.

** Amicus believes that Kahn suffers from the same uncritical acceptance of the "remedial" rationale as did the lower court's opinion, herein. Kahn, however, is one of very few situations where a chivalric discriminatory advantage is not effectively a double-edged sword. The possibility of unwarranted extensions of Kahn demands that this Court clarify that remedial rationales merit close judicial scrutiny.

of "romantic paternalism", it follows that modern day progeny of the traditional protective rationales, like the remedial argument here, will be proferred in support of maintaining sex-discriminatory lines. The danger is thus unique and acute in this area that the practical impact of discrimination will continue to be concealed by the cloak of beneficience.

Accordingly, unequivocal direction to the lower courts to closely scrutinize remedial rationales is necessary. The traditional vehicle for such direction is a declaration by this Court that sex-based classifications are "suspect". Amicus urges the Court to seize the opportunity presented by this case to adopt the opinion of the plurality in Frontiero and accord women the equal protection of strict judicial scrutiny.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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